No. 89-1407

In The

Supreme Court of the United States

October Term, 1989

MISTY DAWN DAVIS, an infant
under eighteen years of age,
by and through her Guardian,
Farmers Bank & Capital Trust
Company of Frankfort, Kentucky,

Petitioner,

v.

KENTUCKY FINANCE COMPANIES RETIREMENT
PLAN; KENTUCKY FINANCE COMPANIES
RETIREMENT PLAN RETIREMENT COMMITTEE;
KENTUCKY FINANCE COMPANY, INC.;
and
CENTRAL BANK & TRUST COMPANY,

Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the deferential standard or a *de novo* trial is required for reviewing an ERISA plan administrator's decision when the plan grants discretionary power to determine eligibility for benefits, and whether a conflict exists among the Circuits in the application of this deferential standard of review?

II. Whether an alleged conflict of interest is to be weighed as a factor in applying the deferential standard of review or whether a *de novo* trial is required in all situations?

III. Whether the doctrine of collateral estoppel applied when no identity of parties or issues existed in a related Kentucky state court case?

IV. Whether the Sixth Circuit and District Court below properly held that extracontractual and punitive damages are not recoverable under ERISA, given the plain meaning of this statute and given that no evidence of egregious conduct by the administrator was presented by the Petitioner?

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Respondents[1] respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of

[1] Pursuant to 6th Circuit Rule 25, Respondents filed a Disclosure of Corporate Affiliations and Financial Interests. Same is reprinted at Appendix 19 through 21 in compliance with U.S. Supreme Court Rule 29.1.

the decision of the Sixth Circuit Court of Appeals entered on October 12, 1989. That Opinion is reported at *Davis v. Kentucky Finance Companies Retirement Plan*, 887 F.2d 689 (6th Cir. 1989) and is set forth at pages App. 1 through App. 19 to the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 877, Sec. 404(a), as amended, 29 U.S.C. 1104(a).

Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 891, Sec. 502(a)(3), as amended, 29 U.S.C. 1132(a)(3).

STATEMENT OF CASE

This action was brought on behalf of Misty Dawn Davis, a minor child, who was the only legal dependent of the decedent, Kenneth C. Davis. Mr. Davis was initially employed by Kentucky Finance on or about March 17, 1960. As of December 31, 1981, Mr. Davis was senior vice-president, legal counsel, director and member of the Kentucky Finance Company's Retirement Plan Retirement Committee ("Committee" or "Retirement Committee"). As a member of the Committee and as in-house counsel, Mr. Davis advised the Committee on interpretative questions concerning the Plan, and was fully acquainted with the Plan terms and provisions. On February 8, 1982, Mr. Davis resigned from his position at Kentucky Finance Company, Inc. ("Kentucky Finance") and opened his own private law practice in Lexington, Kentucky. Kentucky

Finance agreed to pay Mr. Davis six months severance pay in connection with his resignation.[2]

Kentucky Finance had in place a fully funded and defined qualified retirement plan of which Mr. Davis was a member. Monthly retirement income payable to retired employees is governed by Article IV of the Plan. Article V provides for "other benefits," including benefits available to terminated employees. Section 5.01 provides, in part, that when a member's employment is terminated for any reason other than death or retirement, "such member shall cease to be an active member of the Plan". The Plan thus readily distinguishes between active and terminated employees. Pursuant to the minimum vesting standards contained in 29 U.S.C. § 1053, Mr. Davis was fully vested and could, upon reaching normal retirement age, have been entitled to receive monthly retirement income based on his accrued benefits as of the day of his termination. In the alternative, under the terms of the Plan, Mr. Davis could have elected to receive early retirement benefits. Early retirement benefits are available, at a reduced rate, to terminated employees who have reached age 55 and who have been employed for more than 15 years.

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[2] At page 4 of the Petition, Petitioner erroneously states that the plan has a leave of absence provision. Petitioner is referring to Article II, Section 2.35(a)(ii) of the plan. Had Petitioner taken the time to read this Section in its entirety, she would have seen that the "leave of absence" for which services could be credited, relates to "past service", i.e., services to the employer *prior* to 1976, and it obviously has no application to the events which occurred in 1982.

As of May 19, 1982, the day Mr. Davis was murdered by his wife, he had not elected to receive early retirement benefits and thus no benefits had been paid. This contingency is expressly addressed in the last sentence of Section 5.01 of the Plan, which provides:

> Notwithstanding anything expressed or implied to the contrary, in the event a terminated member dies prior to the beginning of the period for which benefits will be payable, no death benefits shall be payable under this Plan.

Accordingly, since Mr. Davis was no longer employed by Kentucky Finance at the time of his death, and had not elected early retirement, as was found by the Committee, the District Court and the Sixth Circuit, no death benefit was payable under the Plan.

After Mr. Davis' untimely death, the Petitioner sought death benefits allegedly due under the Plan. The Retirement Committee, responsible for administering the Plan, met and discussed the request for death benefits made on behalf of the Petitioner. The Committee, in reaching its decision, considered all of the relevant factors and information available to them, including: (1) the fact that Mr. Davis had resigned on February 8, 1982; (2) that Mr. Davis had set up a private law practice in Lexington, Kentucky; (3) that Mr. Davis had no intention of returning to work for Kentucky Finance; (4) that Kentucky Finance had no intention of rehiring Mr. Davis; and (5) that Mr. Davis had not elected to receive early retirement benefits as of the time of his death. After reviewing all of the information available, the Committee determined that pursuant to Section 5.01 of the Plan, no death

benefit was due. Based on this reasoning, the Petitioner's request for death benefits was denied.

Thereafter, the Petitioner brought suit in the U.S. District Court, Eastern District of Kentucky, Lexington, seeking to recover death benefits. In an unpublished opinion, the District Court upheld the Retirement Committee's denial of death benefits. The appeal to the Sixth Circuit followed.

Subsequent to briefing by the parties, this Court handed down its decision in *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). In applying *Firestone*, the Sixth Circuit found that the Kentucky Finance Plan specifically granted the Retirement Committee authority to determine eligibility for benefits and to construe the terms of the Plan. 887 F.2d at 694. The Sixth Circuit thus properly applied the deferential standard required by *Firestone* and affirmed the Retirement Committee's denial of death benefits. Thereafter, the Sixth Circuit denied Petitioner's petition for rehearing by Order entered December 4, 1989. In that petition, Davis set forth virtually the same arguments as presented in her Petition for Writ of Certiorari. The Sixth Circuit considered same and denied that petition.

REASONS WHY PETITION SHOULD BE DENIED

I

THE SIXTH CIRCUIT PROPERLY APPLIED *FIRESTONE TIRE & RUBBER CO. V. BRUCH* TO THIS DISPUTE, AS HAVE OTHER CIRCUIT COURTS, THEREFORE NO SUBSTANTIAL CONFLICT EXISTS AMONG THE CIRCUITS AND THE PETITION FOR WRIT SHOULD BE DENIED.

The only question before this Court is whether the Sixth Circuit properly applied the principals of law set

forth in *Firestone Tire & Rubber Co. v. Bruch, supra*, and whether the same principals have been consistently applied by the other Circuit Courts of Appeals throughout the country. If the Sixth Circuit, along with the other Circuits, have properly applied the principals of law set forth by this Court in *Firestone*, then the Petition for Writ of Certiorari should be denied.

The District Court herein reviewed the Retirement Committee's decision under the then established arbitrary and capricious standard of review. In *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), this Court announced that the deferential standard of review applied where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.*, 109 S.Ct. at 956, 103 L.Ed.2d at 95. If no such authority is granted, then a *de novo* standard of review is to apply. *Id.*

Cognizant of this new rule of law, the Sixth Circuit carefully reviewed the Plan here in question and found that same specifically granted the Retirement Committee the right to determine eligibility for benefits and to construe the terms of the Plan. *Davis v. Kentucky Finance Companies Retirement Plan*, 887 F.2d at 694. Because the subject plan specifically granted such discretionary authority to the Retirement Committee, the Sixth Circuit properly held that the *de novo* standard of a review was inapplicable and that the Retirement Committee's decision should be reviewed under the deferential standard utilized by the District Court below and now required by *Firestone*. *Id.* This is without dispute.

The Petitioner would have this Court believe there exists "substantial conflict" among the Circuits in applying the principals of law set forth in *Firestone*. Yet interestingly, the only cases cited by the Petitioner for this proposition *predate* this Court's opinion in *Firestone*. See Petition for Writ at pages 8-11. Indeed, a review of Circuit Courts' opinions rendered after *Firestone*, reveals consistent application of *Firestone* in resolving disputes under ERISA plans.

Simply stated, the Circuit Courts, along with the Sixth Circuit, have consistently applied the deferential standard required by *Firestone* when the benefit plan specifically grants the administrator the power to determine eligibility and construe terms of the plan and conversely, have applied the *de novo* standard when the plan is silent. See e.g. *Curtis v. Noel*, 877 F.2d 159 (1st Cir. 1989); *Boyd v. Trustees of United Mine Workers Health & Retirement Funas*, 873 F.2d 57 (4th Cir. 1989); *Batchelor v. International Brotherhood of Electrical Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441 (5th Cir. 1989); *Davis v. Kentucky Finance Companies Retirement Plan*, 887 F.2d 689 (6th Cir. 1989); *Bali v. Blue Cross & Blue Shield Assoc.*, 873 F.2d 1043 (7th Cir. 1989); *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989); *Johnson v. Trustees of W. Conf. of Teamsters P.T.*, 879 F.2d 651 (9th Cir. 1989); *Guy v. Southern Iron Workers' Welfare Fund*, 877 F.2d 37 (11th Cir. 1989).

There is no current conflict among the Circuits with respect to applying the appropriate standard of review in ERISA disputes. Indeed, the cases cited by Petitioner evidence the very conflict this Court resolved in *Firestone*:

> We granted certiorari, 485 U.S. ___, 99 L.Ed.2d 498, 108 S.Ct. 1288 (1988), to resolve the conflicts

> among the Courts of Appeals as to the appropriate standard of review in actions under § 1132(a)(1)(B) . . .

Firestone, 103 L.Ed.2d at 91.

Firestone successfully resolved the conflict and cases decided since *Firestone* do not evidence any conflict on this point.

In *Firestone* this Court wrote "a trustee may be given power to construe disputed or doubtful terms, and in such circumstances, the trustee's interpretation will not be disturbed if reasonable." *Id.*, 103 L.Ed.2d at 93 (citing *Bogert & Bogert, Law of Trusts and Trustees* (rev. 2d ed. 1980) § 559, at 169-71.) Moreover:

> [W]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a *discretion vested in them by the instrument* under which they act.

Firestone, 103 L.Ed.2d at 93 (Citing *Nicholas v. Eaton*, 91 U.S. 716, 724-725, 23 L.Ed. 254 (1875) (emphasis added by Court)).

Here, the Retirement Committee's decision to deny benefits was upheld by the Sixth Circuit based on the foregoing standards. The Retirement Committee's decision was reviewed under the deferential standard ordered by this Court in *Firestone*. To-wit, the District Court, in an unpublished opinion held:

> [B]ecause the decision of the Retirement Committee was reasonable, logical and supported by a rational basis, as a matter of law, this Court cannot second guess the Retirement Committee or substitute its interpretation of these circumstances for that of the Retirement Committee

> Therefore, the decision of the Retirement Committee to deny [Petitioner's] claim for death benefits under the Plan must be upheld.

(App. 11)

Not satisfied with the lower Courts' proper application of the law, as set forth in *Firestone*, Petitioner now argues that this Court's decision to apply the deferential standard to administrators exercising discretionary authority, specifically granted by the plan, is deficient because "the test provides an almost unrestricted opportunity for abuse of fiduciaries." Petition for Writ at 10. Petitioner's argument overlooks the fact that decisions of administrators exercising discretionary powers are indeed subject to court review and must comply with general principles of trust law and the standards enunciated by this Court in *Firestone*. Moreover, their actions must be "reasonable" and must not be "an abuse of discretion". *Firestone*, 103 L.Ed.2d at 93. Thus, contrary to Petitioner's spurious allegation, *Firestone* does not provide such administrators with an unbridled opportunity to run amuck with plan assets.

Indeed, Petitioner had nearly five years available to conduct discovery in the case to attempt to prove that the administrator's actions were improper; however, the Court will note that Petitioner failed to offer up any proof of same. There was and is only one conclusion – the Retirement Committee's decision was the only reasonable and logical conclusion.

II

PETITIONER'S ARGUMENT THAT EVEN AN IMAGINARY CONFLICT OF INTEREST REQUIRES A DE NOVO STANDARD OF REVIEW CONFLICTS WITH THE PRINCIPLES OF LAW SET FORTH IN *FIRESTONE TIRE & RUBBER CO. V. BRUCH*

The "conflict of interest" battle cry of the present Petitioner initially arose as a concern in ERISA disputes where the employer operated as the administrator of an *unfunded* benefits plan. See e.g., *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985) and *Bruch v. Firestone*, 828 F.2d 134 (3rd Cir. 1987). The concern over a possible conflict of interest in an *unfunded* plan situation led the Ninth Circuit to adopt a standard less deferential than the arbitrary and capricious standard for review of trustees' decisions. *Jung v. FMC Corp.*, 755 F.2d at 711-712. This concern also led the Third Circuit in *Bruch, supra,* to hold that where an employer itself is the fiduciary and administrator of an *unfunded* benefit plan, that the decision to deny benefits should be subject to a *de novo* judicial review reasoning that in such situations deference is unwarranted given the lack of assurance of impartiality on the part of the employer. *Bruch*, 828 F.2d at 137-145. Yet, this Court in *Firestone* expressly rejected the Third Circuit's radical departure as contrary to established principles of trust law now employed to settle ERISA disputes:

> [W]e hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals,* see 828 F.2d at

> 143-146, *we need not distinguish between types of plans or focus on the motives of plan administrators and fiduciaries* . . . Of course, *if* a benefit plan gives discretion to an administrator or fiduciary who is operating under a *conflict of interest, that conflict must be weighed as a "factor* [ ] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts, § 187, Comment d (1959).

Firestone, 103 L.Ed.2d at 95. (emphasis added)

The Petitioner argues at page 12 of her Petition that the Sixth Circuit should have ignored the above mandate of *Firestone* and applied a *de novo* standard of review even though the Kentucky Finance Plan granted discretionary authority to the Retirement Committee. In essence, the Petitioner is asking this Court to overrule *Firestone* and apply a *de novo* standard of review to ***all*** ERISA disputes regardless of plan language, and regardless of whether the plan is funded or unfunded.

In support of her position, the Petitioner concludes, without any support whatsoever, that the Retirement Committee had a direct and personal financial interest in denying the Petitioner's claim for death benefits. However, a review of the record clearly reveals that such is not the case. Indeed, as pointed out by Petitioner at page 3 of her Petition, the Plan here in question is a fully funded and specifically defined ERISA benefit plan.

Petitioner further likens the present situation to that faced by the Third Circuit in *Bruch v. Firestone*, 828 F.2d 134, 143-146 (1987). In that case Judge Becker pointed out where an *unfunded* pension plan is controlled by an employer there is always an incentive for the employer/administrator to deny benefits:

> Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket.

Bruch, 828 F.2d at 144.

Such is not the case in the present situation as this plan is fully funded and defined. The money is already in the plan. It is not an obligation to be paid or funded later. The money has already been removed from Kentucky Finance. Petitioner on the other hand would have this Court presume a bias, impartiality, lack of loyalty and conflict of interest in every situation where the employer operates as the administrator of a benefit plan. Yet no authority is cited by Petitioner for that proposition. Indeed, Circuit Courts specifically addressing this issue, after *Firestone*, have ruled contrary to Petitioner's desires. In *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989) the court refused to attribute a presumptive bias to administrators who served dual roles as company employees and plan fiduciaries of a *fully funded* and defined benefit plan. In *De Nobel*, the court reviewed the record and found that there was simply "no evidence" that the plan administrator's benefit determinations were tainted by any conflict of interest. In explaining its decision, the *De Nobel* court wrote:

> [B]enefit decisions have an immediate impact only on the fund itself. In turn Vitro [the employer] incurs no direct, immediate expense as a result of the benefits determinations favorable to plan participants.

De Nobel, 885 F.2d at 1191.

The same is true in the present situation since this plan is fully funded and defined. Like the retirees/claimants in *De Nobel,* the Petitioner here would have this Court find that the Retirement Committee was necessarily operating under a conflict of interest because the Plan itself did not pay a challenged death benefit. The *De Nobel* court rejected such reasoning noting:

> That plan administrator's decisions have had a favorable impact on the balance sheet of the trust itself, however, suggests no "conflict of interest." Fiduciaries are obligated to act not only in the best interests of beneficiaries, but with due regard for the preservation of trust assets. Adverse benefits determinations may well save considerable sums, but that may simply reflect that the trustees, bearing in mind the interest of *all* participants and beneficiaries, 29 U.S.C. § 1104(a)(1), made a considered decision to preserve the corpus of the trust, rather than grant a doubtful claim. This the statute affirmatively contemplates; and standing alone it clearly suggests no "presumptive" bias.
>
> What the retirees effectively seek, therefore, is a broad holding that fiduciaries of fully funded, defined benefit ERISA trust cannot be considered "impartial" if they also serve as employees of the plan's sponsor. Courts have repeatedly rejected such claims, however, and we decline to depart from the settled rule. See e. g., *Local Union 2134, UMW of America v. Powhatan Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987); *McMahon v. McDowell*, 794 F.2d 100, 110 (3rd. Cir. 1986); *Morris v. Stanley*, 732 F.2d 1139, 1146 (2nd. Cir. 1984). That said, and on the basis of our finding that the challenged interpretation of the Vitro plan was indeed "reasonable", we hold that the defendant administrator's decision to deny the

plaintiff's claims for "enhanced" benefits did not constitute an abuse of discretion.

De Nobel, 885 F.2d at 1191-1192.[3]

Similarly, in *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525-526 n.7 (5th Cir. 1989) the court noted the significant difference between funded and unfunded plans in an alleged conflict of interest situation:

> Incidentally, we note that with respect to the unfunded plan at issue in *Bruch*, "every dollar provided in benefits is a dollar spent by . . . Firestone the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." *Bruch v. Firestone Tire & Rubber Company*, 828 F.2d 134, 144 (3rd Cir. 1987). In contrast, the retirement plan in this case is a funded, defined benefit plan. "[I]n these defined-benefit plans, the immediate impact of a decision to grant or deny benefits is on the trust itself and not on the employer; only if the total of all claims paid exceeds the actuarially anticipated amounts would benefit decisions by a trustee have a financial impact on the employer." Brief for Respondents at n. 19, *Firestone Tire & Rubber Company v. Bruch*, No. 87-1054 (available on LEXIS, Genfed Library, Briefs File).

Like the plans at issue in *Lowry* and *De Nobel, supra*, the Kentucky Finance Retirement Plan is a fully funded, defined benefit plan. As such, the Retirement Committee's decision to deny the Petitioner's death benefit claim

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[3] This Court will note that the Fourth Circuit in *De Nobel* based its decision on the express language of *Firestone*, 103 L.Ed.2d at 95.

could have only an impact on the Plan itself, and not on the employer, Kentucky Finance, let alone any of the members of the Retirement Committee individually. Petitioner paints the picture that the individual members of the Retirement Committee were usurping the Plan assets and for that reason denied her claim. Respondents vehemently resent this allegation and note that Petitioner has presented no evidence in this protracted litigation of any such conduct.

Finally, given the record as it really existed, and not as the Petitioner imagined, the Sixth Circuit properly ruled:

> The fact that the Retirement Committee that administers the plan is composed of management level employees of KFC is significant only to the extent that any possible conflict of interest should be taken in account as a factor in determining whether the Committee's decision was arbitrary and capricious.

Davis, 887 F.2d at 694. (Citing *Firestone Tire & Rubber Company v. Bruch*, 109 S.Ct. at 956, 103 L.Ed.2d at 95.)

One final note, Petitioner belabors her "conflict of interest" argument by theorizing that the Retirement Committee knew Kentucky Finance was the defendant in a lawsuit where Kentucky Finance could be liable for a One Million Dollar ($1,000,000.00) judgment if Davis was an employee. Petition at page 12. Petitioner reasons that this caused the Committee to claim that Davis was not an employee and resulted in the denial of her claim. Nothing could be more illogical. That lawsuit, against several insurance companies which wrote group life insurance coverage for Kentucky Finance employees, claimed Davis

was an employee as defined by the policies at death. If recovery by the Davis Estate was denied, then the alternate claim asked that Kentucky Finance pay an amount equal to the group policies coverage. Contrary to Petitioner's claim, Kentucky Finance was exposed to liability if Davis was ***not*** an employee under the policies, because if Davis was held to be an employee the life insurance companies were liable and the alternative claim against Kentucky Finance was mooted.

Kentucky Finance, as did the Retirement Committee, responded with the truth without regard to the consequences. There was no arbitrary or capricious action and there is no evidence of such.

III

THE DOCTRINE OF COLLATERAL ESTOPPEL HAS NO APPLICATION WHERE THERE EXISTS NO IDENTITY OF PARTIES NOR IDENTITY OF ISSUES

Petitioner once again argues that the issue of Mr. Davis' employment status was conclusively decided by the Court in *Woodson v. Manhattan Life Insurance Company of New York*, 743 S.W.2d 835 (Ky. 1987). Because that court held that Mr. Davis was entitled to proceeds, *solely* under the terms of a group life insurance policy in issue, Petitioner argues that the doctrine of collateral estoppel required the courts below to hold that Davis was an employee for ERISA purposes. Once again, Petitioner's collateral estoppel argument must fail due to a lack of identity of issues or identity of parties as found by the District Court and Sixth Circuit. The lack of identity of issues will be discussed first.

In *Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979) this Court confirmed the long established principle of law that without an identity of issues between two separate actions, the doctrine of collateral estoppel is inapplicable. See also *George v. United Kentucky Bank, Inc.*, 753 F.2d 50, 53 (6th Cir. 1985) *cert. denied*, 471 U.S. 1018, 105 S.Ct. 2024, 85 L.Ed.2d 306 (1985). "[A] court must initially determine whether the issues presented in the record action are identical to those resolved in the previous action." *United States v. Stauffer Chemical Company*, 684 F.2d 1174, 1190 (6th Cir. 1982) (Jones, J., concurring) (citing *Montana v. United States, supra*), *aff'd*, 464 U.S. 165, 78 L.Ed.2d 388, 104 S.Ct. 575 (1984). Moreover, this Court in *Commissioner v. Sunnen*, 333 U.S. 591, 599-600, 92 L.Ed. 898, 68 S.Ct. 715 (1948) cautioned and then held:

> [C]ollateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts . . . remain unchanged. (emphasis added)

The District Court below recognized this deficiency and properly rejected Petitioner's collateral estoppel argument. In so ruling, the District Court found that the Kentucky Supreme Court had determined Davis' employment status *solely* under the terms of a group life insurance policy (a contract issue) there in question:

> The foregoing holding is based soley on the terms of the group life insurance policy issued by Manhattan Life Insurance Company; therefore, because this holding stems only from the narrowly defined provisions in this particular

> policy, it can in no way be binding on either the Retirement Committee or on this court.

(App. 15)

Additionally, in *Woodson,* the Kentucky court found that Davis had ceased to do any act of work for Kentucky Finance. *Woodson,* 743 S.W.2d at 840. In view of this, the Kentucky Supreme Court focused on the language of the contract of insurance which the court quoted as follows:

> Termination of employment, for purposes of life insurance hereunder, means cessation of act of work for the policyholder as provided in Section I hereof entitled "definitions", except that
>
> . . .
>
> (ii) in the case of the absence of the individual from active work because of leave of absence or temporary layoff, *his employment may, for the purposes of his life insurance hereunder, be* ***deemed*** *to continue* until terminated by the policyholder but in no case beyond the expiration of a period of six months following the date such leave of absence or layoff commenced.

Woodson, 743 S.W.2d at 837. (emphasis added)

It is important to note that the Kentucky Supreme Court seized upon the above policy language wherein absence of an individual from active work, "his employment may, for purposes of his life insurance hereunder be *deemed* to continue" for a period of six months. At page 838 of the same opinion, the Kentucky Supreme Court quotes and italicizes "*deemed to continue*" as a reason for its opinion. It is inherent in the use of the word "deemed" that the Kentucky Supreme Court recognized that Davis was not an employee of Kentucky Finance but was

"deemed" by the express terms of the policy to be such for insurance coverage only!

The Kentucky Supreme Court further based its decision on the Kentucky state court doctrines of *ambiguity* and *reasonable expectations*, both theories which are utilized to find coverage under an insurance policy. *Woodson*, 743 S.W.2d at 838. The District Court below recognized the differing standards as follows:

> Attempting to juxtapose the rationale of *Woodson* to an ERISA action is like trying to mix apples and oranges. The standard of review the court is bound to follow in reviewing the actions of trustees in ERISA actions has absolutely no relationship to the applicable law the court is bound to follow in interpreting the terms of an insurance policy.

(App. 16)

The Sixth Circuit likewise recognized this deficiency and refused to blindly apply collateral estoppel where there was no identity of issues. *Davis*, 887 F.2d at 695 (citing *Montana v. United States*, *supra*). Petitioner's argument to the contrary, thus ignores the very language of *Woodson* which she seeks to apply as determinative of all issues in this case.

The second primary reason Petitioner's collateral estoppel argument must fail is because there existed no identity of parties between the state court action and this action. *George v. United Kentucky Bank, Inc.*, 753 F.2d at 53. Collateral estoppel is inapplicable when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier

case. *Allen v. McCurry,* 449 U.S. 90, 95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

Kentucky Finance was brought into the state court action by the Estate of Kenneth Davis on an alternative theory of misrepresentation. That claim was dismissed after opening statements; Kentucky Finance left the courtroom and did not further participate in the trial; thus, Kentucky Finance did not litigate the issue of Ken Davis' employment status in that action and collateral estoppel cannot apply.

The Petitioner nevertheless argues that the Sixth Circuit's reliance on *Montana v. United States, supra,* was misplaced on this issue. In support of this position, Petitioner states that Kentucky Finance's involvement in the state court action "was at least as extensive as the involvement of the United States in the state court action in the *Montana*" case. Petition at 16. Petitioner's "laboring oar" argument is simply incorrect. In *Montana v. United States,* the United States' extensive involvement in a prior state court action was summarized as follows:

> That the United States exercised control over the Kiewit I litigation is not in dispute. The government has stipulated that it:
>
> (1) required the Kiewit I lawsuit to be filed;
>
> (2) reviewed and approved the complaint;
>
> (3) paid the attorneys fees and costs;
>
> (4) directed the appeal from the state district court to the Montana Supreme Court;
>
> (5) appeared and submitted brief as amicus in the Montana Supreme Court;

(6) directed the filing of a notice of appeal to this court; and

(7) effectuated Kiewit's abandonment of that appeal on advice of the Solicitor General.

Montana v. United States, 59 L.Ed.2d at 218.

How could Kentucky Finance Company's involvement have been as extensive as that of the United States in *Montana v. United States* when Kentucky Finance was brought into the litigation as a defendant; was dismissed after opening statements at trial; did not incur further attorney fees and costs; did not direct the appeal of any other party; was itself not involved in the state court appellate process; and, filed no briefs to the Kentucky Supreme Court? Simply stated, it was not. The mere fact that an affiliated life insurance company was also a defendant at the trial is of no import for three reasons.

First, Kentucky Central Life Insurance Company was defending under the express terms of another life insurance policy and not the terms of the ERISA plan here in issue. Thus, there is a lack of identity of issues.[4]

Second, Kentucky Central, not Kentucky Finance, controlled its aspect of the state court litigation.

Third, it is undisputed that the Kentucky Finance Retirement Plan and Retirement Committee were never parties to the state court action. As previously pointed

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[4] Again, since the single issue of the decedent's employment status under the Kentucky Finance ERISA Plan was not litigated by any party to the state court action, collateral estoppel cannot apply. See discussion at pages 16 through 19, *supra*, herein.

out under Section II of this brief, it is clear that the interest of a retirement plan and its sponsoring employer are different.

A similar situation arose in *Hurt v. Pulman, Inc.*, 764 F.2d 1443 (11th Cir. 1985) where the employer and plaintiff/employee were involved in a prior state court Workers Compensation action. The plaintiff/employee subsequently brought an ERISA action against the employer and the Pension Plan seeking recovery of disability benefits. The Pension Plan asserted that the plaintiff/employee was collaterally estopped from litigating certain issues decided in the Workers Compensation action. The Eleventh Circuit disagreed, holding that collateral estoppel was inapplicable because there existed no identity of parties between the two actions. The court held, that while the Pension Plan was a creation of the employer, the two were separate entities asserting different interests. The court found that the employer had appeared in its *corporate capacity* in the Workers Compensation action and had asserted interests therein different from its interests as a trustee of the Pension Plan in the subsequent ERISA action, and further, different from the interests of the Pension Plan in the same ERISA action. *Id.* at 1450.

Because the interests of Kentucky Finance in its corporate capacity are thus different from the interests of the Retirement Committee as trustee of the benefit Plan, and different from the interests of the Plan itself, then it is clear that the interests of Kentucky Central Life Insurance Company in the state court action were different than the interests of the Retirement Committee, Retirement Plan,

and Kentucky Finance, thus collateral estoppel is inapplicable.[5]

The District Court and the Sixth Circuit, having carefully considered the record and all relevant factors, properly held that collateral estoppel was inapplicable due to a lack of identity of issues and a lack of identity of parties. For this reason, Petitioner's collateral estoppel argument must again fail.

IV

PETITIONER'S CLAIM FOR EXTRA-CONTRACTUAL AND PUNITIVE DAMAGES BASED ON ASSERTED STATE LAW THEORIES OF PROMISSORY ESTOPPEL AND FRAUD ARE PREEMPTED UNDER ERISA AS FOUND BY THE COURTS BELOW AND MOREOVER FAILED ON A FACTUAL BASIS AS PETITIONER PRESENTED NO EVIDENCE SUPPORTING HER STATE LAW CLAIMS FOR PROMISSORY ESTOPPEL AND FRAUD.

The Petitioner once again argues that she is entitled to extra-contractual and punitive damages in her Petition for Writ at 17-19. The first and most critical flaw in Petitioner's argument is the fact that the District Court and the Sixth Circuit found no abuse of discretion let alone breach of fiduciary duty by the Retirement Committee. Without establishing these elements, it is undisputed that the Petitioner was not even entitled to seek extra-contractual and punitive damages as a matter of law.

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[5] At this point, it is important once again to remember that had the Petitioner been successful in asserting her claim, the Retirement Plan itself would have been liable, not the Retirement Committee or Kentucky Finance.

Secondly, Petitioner's claim for extra-contractual and punitive damages was based on alleged equitable claims grounded in Kentucky state law, namely equitable estoppel and/or fraud. Indeed Petitioner cited and argued the case of *Gray v. Jackson Purchase Production Credit Association*, 691 S.W.2d 904 (Ky. App. 1985) before the Sixth Circuit in support of her claim for such damages. The Sixth Circuit found that Petitioner's equitable estoppel claim for extra-contractual damages was preempted by ERISA based on this Court's ruling in *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987). *Davis v. Kentucky Finance Companies Retirement Plan*, 887 F.2d at 696-697.

Because Petitioner's claim for extra-contractual and punitive damages was based solely on a state law theory preempted by ERISA, it is not surprising that she failed to reassert same in her Petition for Writ of Certiorari.

Petitioner nevertheless postulates at page 19 of her Petition for Writ, "that the acts of the fiduciaries in this case may be such an egregious breach of fiduciary duty under 29 U.S.C. § 1104 that the demand for extra-contractual compensatory and punitive damages is justified." The alleged "egregious conduct", which Petitioner conspicuously failed to enunciate in her Petition, but in fact argued before the Sixth Circuit, was fraud and misrepresentation allegedly committed by the Retirement Committee against the decedent, Kenneth Davis. As previously pointed out, Mr. Davis was himself a member of the Retirement Committee and the attorney charged with counseling the Committee on same. The District

Court recognized there was no fraud or misrepresentation by the Retirement Committee as did the Sixth Circuit:

> The decedent was the legal counsel in charge of interpreting the Plan and counseling the Committee. As such, he was extremely knowledgeable about the contents of the Plan and the way in which the Committee was disposed to administer it. *It is hard to imagine a harder case in which to prove fraud or misrepresentation; if the attorney charged with advising the Committee on administration of the Plan was fooled by the workings of the Plan, then the Plan cannot withstand any challenge.*

Davis v. Kentucky Finance Companies Retirement Plan, 887 F.2d at 696. (emphasis added)

Since there was clearly no factual basis for awarding extra-contractual or punitive damages in the present situation, the District Court and Sixth Circuit were proper in denying Petitioner's claims on this issue.

Moreover, this court ruled in *Firestone Tire & Rubber Company v. Bruch, supra,* that the decisions of plan administrators are to be governed by the principles of trust law. It is because of this mandate that Petitioner's additional claim for punitive damages under § 502(a)(3), 29 U.S.C. § 1132(a)(3), must fail.

It is undisputed that punitive damages are not ordinarily available under trust law in an action for a breach of a fiduciary duty. In fact, Circuit Courts which have denied claims for extra-contractual damages under § 502(a)(3) of ERISA, have specifically relied on principles of trust law for their holdings. See *Sommers Drug Stores*

Company Employees Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1463-64 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 [relying on Restatement (Second) of Trusts §§ 205 & 206, and 3 *A. Scott, The Law of Trusts* §§ 205-206 (1967)]; *Kleinhans v. Lisle Saving Profit Sharing Trust*, 810 F.2d 618, 627 (7th Cir. 1987) ["Because Congress intended the interpretation of ERISA to be guided by principles developed under the law of trusts, absent express language to the contrary in the statute, we will not interpret ERISA to provide punitive damages for breach of a trustee's fiduciary obligations where such damages are not generally available under the law of trusts."]; *Powell v. Chesapeake & Potomac Telephone Company of Va.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986) [relying on Restatement (Second) of Trusts § 205 (1959); *G. Bogert & G. Bogert, The Law of Trusts and Trustees*, § 862 (2d Ed. 1982); and, *A. Scott, The Law of Trusts*, § 198.1 (1967)]; *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981); and *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987).

Based on the foregoing, it is clear the Sixth Circuit's denial of the Petitioner's claim for extra-contractual damages under § 502(a)(3) of ERISA was justified. *Davis v. Kentucky Finance Companies Retirement Plan*, 887 F.2d at 696-697 (citing *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 105 S.Ct. 385, 87 L.Ed.2d 96 (1985), and *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)).

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 83-251

MISTY DAWN DAVIS, ETC., PLAINTIFF,

VS. MEMORANDUM OPINION

KENTUCKY FINANCE COMPANIES RETIREMENT PLAN, ET AL., DEFENDANTS.

* * *

INTRODUCTION
(Filed June 21, 1988)

This matter is before the court on (1) the defendants' motion for summary judgment; (2) plaintiff's motion to renew her motion for summary judgment; (3) plaintiff's motion for partial summary judgment; and (4) plaintiff's motion for a scheduling order. These motions have been fully briefed and are ripe for a decision.

Although plaintiff objects to the defendants' motion for summary judgment on the grounds that it was filed subsequent to September 26, 1986, the date established by the court for the filing of motions for summary judgment, the record reflects that subsequent to the filing of the defendants' motion for summary judgment, the plaintiff moved to renew her motion for summary judgment and also moved for partial summary judgment. Consequently, due to the fact that both parties have untimely filed cross-motions for summary judgment, the court shall consider both motions.

This action concerns the Employee Retirement Income Security Act (hereinafter "ERISA"), Title 29 U.S.C. §1001, *et seq.* Plaintiff brought this action under Title 29

U.S.C. §1132 to obtain judicial review of the decision of defendant Kentucky Finance Companies Retirement Plan Retirement Committee (hereinafter "Retirement Committee") to deny her request for payment of death benefits which she claimed were due her pursuant to the Kentucky Finance Companies Retirement Plan (hereinafter "Plan").

FACTUAL BACKGROUND

Plaintiff, Misty Dawn Davis, is a minor child and a legal dependent of the late Kenneth C. Davis, who died on May 19, 1982. This action hinges on the fact that plaintiff believes her deceased father, Kenneth C. Davis, who was an attorney licensed to practice law in Kentucky, was employed by Kentucky Finance Company, Inc. (hereinafter "Kentucky Finance") at the time of his death.

The record reflects that Mr. Davis began working for Kentucky Finance on or about March 17, 1960. As of December 31, 1981, Mr. Davis was Senior Vice-President, and Legal Counsel for Kentucky Finance. He was also on the Board of Directors of Kentucky Finance and was a member of the Retirement Committee. As a member of the Retirement Committee and as in-house counsel for Kentucky Finance, it was Mr. Davis' function to advise the Retirement Committee on interpretive questions concerning the Plan. (Schaeffer Affidavit, Exhibit "A").

However, after more than twenty-one (21) years of employment with Kentucky Finance, it seems that Davis had decided to open his own private law practice in Lexington, Kentucky. On February 9, 1982, he resigned from his positions at Kentucky Finance. In conjunction

with this resignation, Kentucky Finance agreed to pay him severance pay equal to his regular salary for six months.

Throughout the course of his employment with Kentucky Finance, his employer had in place a qualified ERISA retirement plan (hereinafter "Plan"), of which Davis was a member. This Plan was originally adopted by Kentucky Finance in 1959 and was amended several times thereafter to conform with changes in ERISA enacted by Congress.

Pursuant to the ERISA requirements, the Plan provides retirement income for terminated employees whose benefits have "vested." Minimum vesting standards are set out in Title 29 U.S.C. §1053 and, as applied to this Plan provide for vesting of 100% of accrued benefits for employees with at least fifteen (15) years of service. Since Davis had worked for Kentucky Finance for more than fifteen (15) years, his accrued benefits were fully (i.e., 100%) vested.

Therefore, under Article IV of the Plan, as a retired employee whose accrued benefits had fully vested at the time of his retirement, Davis would have been entitled to a monthly retirement income upon reaching normal retirement age.

However, as seen in Article V, Section 5.01 of the Plan, Mr. Davis could have elected to receive his early retirement benefits any any [sic] time prior to reaching retirement age. Section 5.01 states as follows:

> . . . Subject to the provisions of Section 4.02, at any time prior to the commencement of his

> Monthly Retirement Income, a terminated Member may elect to receive his benefits in an Actuarially Equivalent alternate form. Notwithstanding anything expressed or implied to the contrary, in the event a terminated Member dies prior to the beginning of the period for which benefits will be payable, no Death Benefit shall be payable under this Plan.

The foregoing section indicates that if a terminated employee dies before he starts receiving his retirement benefits (be it normal retirement or reduced retirement benefits), then no death benefit is payable. On the other hand, it seems that if a terminated employee is receiving retirement benefits at the time of his death, then a death benefit not to exceed $25,000.00 would be payable to either a surviving spouse or a dependent child. No death benefit would be payable if there were neither a surviving spouse nor a dependent child. *See* Section 5.02.

In keeping with Sections 5.01 and 5.02 of the Plan, if Mr. Davis had elected to receive his early retirement benefits and had been receiving them at the time of his death, then a death benefit would have been payable to his dependent child, Misty Dawn Davis, plaintiff herein.

Consistent with the language found in Section 5.01 of the Plan, the Retirement Committee denied plaintiff's claim for payment of the death benefit based on the fact that Davis had not elected to receive early retirement benefits prior to his death.

THE REASONING OF THE RETIREMENT COMMITTEE IN DENYING PLAINTIFF'S CLAIM

The rationale of the Retirement Committee's decision to deny plaintiff's claim for benefits under the Plan is

embodied in the affidavit of Edwin F. Schaeffer, Jr., a member of the Retirement Committee, who states as follows:

> 7. On or about March 22, 1983, the Plaintiff herein made a formal claim for benefits under the Plan. In April 1983 the Committee discussed the claim and considered the following information:
>
> a. Kenneth Davis had resigned his position with Kentucky Finance effective February 9, 1982, and had started a private law practice in Lexington, Kentucky.
>
> b. Kentucky Finance had agreed to pay Mr. Davis six (6) months' severance pay in connection with his resignation.
>
> c. Mr. Davis had no intention of returning to work for Kentucky Finance, and they had no intention of rehiring Mr. Davis.
>
> d. Mr. Davis had completed at least fifteen (15) years of service with Kentucky Finance and was over 55 years of age at the time of his resignation. Accordingly, he could have elected to receive early retirement benefits although at a reduced rate.
>
> e. At the time of Mr. Davis' death on May 19, 1982 he had not elected to receive early retirement benefits and thus no benefits had been paid.
>
> f. §5.01 of the Plan expressly states that if a terminated employee dies prior to the beginning of payment of benefits, then "no Death Benefit shall be payable."
>
> 8. After reviewing the available information, the Committee determined that Mr. Davis' employment had been terminated as of February 9,

> 1982, that he was not an employee as of May 19, 1982, that he had not elected to receive early retirement benefits and therefore, pursuant to §5.01 of the Plan, no Death Benefit was due.

Schaeffer Affidavit of 7-21-87, Exhibit "A."

APPLICABLE LAW

It is well settled that this court has no authority to perform a *de novo* review of the decision of the Retirement Committee. As pointed out by the United States Court of Appeals for the Sixth Circuit in *Cook v. Pension Plan For Salaried Employees*, 801 F.2d 865 (6th Cir. 1986):

> The rule in this and other circuits is that judicial review of decisions by Plan administrators to deny pension benefits is limited to a determination of whether that denial was arbitrary or capricious. (Citations omitted).

Id. at 869-870.

The pension plan in *Cook, supra,* was somewhat redundant, ambiguous, and internally inconsistent concerning the types of terminations that are defined as "discharges." This ambiguity stemmed from the fact that §10.1(g) that was added to the Plan in 1977 was "a standard provision in steel industry labor contracts and was not drafted specifically to conform to the Cyclops Plan." *Id.* at 869. §10.1(g) was "industry language" that was not entirely consistent with §10.1(e)(2) of the Cyclops Plan.

On the issue of this ambiguity, the *Cook* court noted, as follows:

> The Plan argues that the district court applied a de novo standard of review by rejecting

> the interpretation given by the Board and applying its own interpretation of the provision under review. The Plan concedes that these provisions are, at least, susceptible to two interpretations: that given by the Board and that given by the district court. However, it contends that where such ambiguity exists, the Board's interpretation shold [sic] be upheld even though the court disagrees with it, so long as the Board's interpretation is rationally related to a valid plan purpose and is not contrary to the plain language of the Plan. *See Gaines v. Amalgamated Insurance Fund*, 753 F.2d 288, 289 (3d Cir. 1985). We agree.

Id. at 870.

The *Cook* court further elaborated on the ambiguity problem, as follows:

> . . . The Pension Board opted to resolve the ambiguity based on an interpretation of the Plan language which is neither inconsistent with the provisions here at issue nor inconsistent with a valid Plan purpose.
>
> We readily concede that the district court's attempt to reconcile the inconsistency in the two sections was a rational one. Our conclusion in this appeal, however, rests on our determination that the Board's construction of section 10.1(g) is also rational.

Id. at 870-871.

This ambiguity issue was also addressed in *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2nd Cir. 1983), *cert. denied*, 464 U.S. 829 (1983). The *Miles* court expressed the rule regarding ambiguous language in pension plans, as follows:

> . . . Where both the trustees of a pension fund and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees' interpretations must be allowed to control.

Miles, 698 F.2d at 601.

In reversing the district court's decision that was favorable to the employee, the *Cook* court stated, as follows:

> . . . The case law is uniform, however, in holding that, under such circumstances, the deference to be accorded the Board in the administration of its plan requires the court to stay its hand in the interest of efficient pension administration. In this case, the district court exceeded the scope of review of the Board's denial of benefits.

Cook, 801 F.2d at 871.

Another case on which the defendants rely is *Roberson v. General Motors Corporation, Detroit Diesel Allison Division*, 801 F.2d 176 (6th Cir. 1986). This case concerned a disability pension claim and a health care benefits claim. The Plan denied both of these claims. Subsequently, the employee initiated two separate actions in district court, which granted summary judgment to the defendant in both actions.

On appeal, the *Roberson* court noted, as follows:

> The district court properly concluded that the appropriate standard of review of the board's denial of disability pension benefits to appellant is whether such action was arbitrary or capricious. *See Norman v. United Mine Workers of America Health & Retirement Funds*, 755 F.2d 509, 510 (6th Cir. 1985); *Moore v. Reynolds Metals*

> *Co. Retirement Program for Salaried Employees,* 740 F.2d 454, 457 (6th Cir. 1984), *cert. denied,* 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985). *See also Van Gunten v. Central States, Southeast & Southwest Areas Pension Fund,* 672 F.2d 586, 587 (6th Cir. 1982): "The standard for court review of a determination to deny pension benefits is whether the denial was arbitrary, capricious, or in bad faith."

Roberson, 801 F.2d at 180.

The *Roberson* court went on to bold that there was no evidence of arbitrary and capricious conduct by the Plan and affirmed the decision of the district court in favor of the Plan.

ANALYSIS

Obviously, the circumstances surrounding Davis' resignation from Kentucky Finance combined with his six months' severance pay are subject to more than one interpretation.

The Retirement Committee concluded that his employment with Kentucky Finance was terminated on February 9, 1982 because (1) Davis had decided to go into a private law practice in Lexington, Kentucky; (2) Davis had no intention of returning to work for Kentucky Finance; and (3) Kentucky Finance had no intention of rehiring Davis.

The construction of this scenario urged by plaintiff is that Davis was still employed by Kentucky Finance at the time of his death because he was still being paid his regular salary by Kentucky Finance.

As previously stated, in conjunction with his resignation, Kentucky Finance agreed to pay Davis severance pay equal to six months of his regular salary. Apparently, this severance pay was not paid in a lump-sum payment; instead, Davis was to receive his regular salary for a period of six months following his resignation (i.e., until August 9, 1982). Due to the fact that he died in the interim between February 9, 1982 and August 9, 1982, while still receiving his regular salary, plaintiff submits that the Retirement Committee erred as a matter of law in not concluding that he was still employed by Kentucky Finance.

In reviewing plaintiff's claim for death benefits under the Plan, the Retirement Committee recognized that on the date that he resigned (February 9, 1982) or any date thereafter, Davis could have elected to receive early retirement benefits. The court can only speculate as to why Davis chose not to receive these early retirement benefits; however, it is logical and reasonable to infer that he preferred to wait and receive his full retirement benefits to which he would have been entitled at the normal retirement age, rather than take a reduction in these retirement benefits.

Regardless of Davis' reason for not electing to receive these early retirement benefits (be it by his omission or by his desire for full retirement benefits at a later age), in denying plaintiff's claim the Retirement Committee relied on Section 5.01 of the Plan which expressly states that if a terminated employee dies prior to the beginning of payment of benefits, then no death benefit is payable.

If Mr. Davis were still alive he could explain why he did not elect to receive early retirement benefits. However, that is not the issue. The issue is whether the decision of the Retirement Committee has a rational basis. The Court is bound to uphold the decision of the Retirement Committee unless its decision is arbitrary and capricious.

DECISION

Based on the circumstances surrounding the resignation of Kenneth C. David from Kentucky Finance and the information that was presented to the Retirement Committee, the court concludes that the decision of the Retirement Committee to deny plaintiff's claim was made with a rational basis and that it was not arbitrary and capricious. The ambiguity of the circumstances behind Davis' resignation might have been interpreted differently; however, because the decision of the Retirement Committee was reasonable, logical and supported by a rational basis, as a matter of law this court cannot second-guess the Retirement Committee or substitute its interpretation of these circumstances for that of the Retirement Committee.

Therefore, the decision of the Retirement Committee to deny plaintiff's claim for death benefits under the Plan must be upheld.

By granting the defendants' motion for summary judgment, the court has also resolved plaintiff's claim that the defendants violated ERISA by not providing her with the information she requested concerning possible Plan benefits. As the defendants correctly point out, they had no duty to provide information to anyone who is not

presently entitled to benefits and will never become entitled to benefits in the future.

This rule is found in *Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust*, 662 F.2d 617 (9th Cir. 1981), wherein the widow of a member of the defendant "Plan" filed an ERISA action to collect death benefits for the death of her husband and to recover statutory damages for the Plan's failure to provide an accounting as required by 29 U.S.C. §1025. In *Hernandez*, the employee/member had died prior to reaching retirement age, and he, just as plaintiff's father herein, had not started receiving benefits.

The *Hernandez* Plan included a "joint and survivor annuity benefit" which would have entitled his surviving spouse to receive a portion of his pension after his death, if he had been receiving pension benefits prior to his death. This Plan provided that while the pension benefit became 100% vested after ten years of service, an employee had no right to receive benefits until he reached normal retirement age. Therefore, based on the Plan's provisions, the trustee determined that no survivor's benefit was due to the widow of Hernandez.

The *Hernandez* court affirmed the decision of the district court in granting summary judgment for the defendant Plan, which held the "although Hernandez' accrued benefits had become 100% vested, this vested right is not an immediate right." 662 F.2d at 618. In dismissing plaintiff's claim that she had the right to an accounting under 29 U.S.C. §1025, the *Hernandez* court stated, as follows:

> The district court ruled that as a result of the failure of Hernandez to qualify as a recipient of pension benefits, appellant was not a beneficiary as defined in §1002(8). We agree. Appellee had no duty to provide information to appellant because she was not entitled to benefits and would never in the future become entitled to benefits; therefore, she was not one who "may become entitled to a benefit" under §1002(8).

Hernandez, 662 F.2d at 621.

The reasoning of the *Hernandez* court (that if no benefits are payable under the Plan, then the Plan is not obligated to provide an accounting of potential benefits to one who is not entitled to Plan benefits) is equally applicable to the action *sub judice*.

The Retirement Committee determined that no benefits were payable to plaintiff under the Plan and explained the reasons therefor; nothing more is required by ERISA. Consequently, because plaintiff was not entitled to Plan benefits, the defendants had no duty to provide an accounting to her. Therefore, plaintiff's claim for statutory damages contained in Count II of her complaint must also fail. It is moot.

An Order and Judgment consistent with this Memorandum Opinion will be entered on the same date herewith.

This 21st day of June, 1988.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 83-251

MISTY DAWN DAVIS, ETC., PLAINTIFF,

VS. MEMORANDUM OPINION AND ORDER

KENTUCKY FINANCE COMPANIES RETIREMENT PLAN, ET AL., DEFENDANTS.

* * *

This matter is before the court on the plaintiff's three separately styled motions which the court collectively construes to be a motion under FRCP 59(e) to alter or amend the Order and Judgment entered herein on June 21, 1988. The defendants having responded to plaintiff's motions, this matter is ripe for consideration.

A review of plaintiff's motions indicates that she raises the same argument that was presented in her motion for summary judgment and her motion for partial summary judgment. Plaintiff seems to be of the mistaken belief that the decision of the Kentucky Supreme Court in *Woodson v. Manhattan Life Insurance Co. of New York*, 743 S.W.2d 835 (Ky. 1987), is dispositive of the employment issue presented herein and is binding on this court.

Woodson, supra, originated in Fayette Circuit Court; the jury found that under the terms of a group life insurance policy issued by Manhattan Life Insurance Company, Kenneth C. Davis was an employee of Kentucky Life Insurance Company who was on a leave of absence at the time of his death.

On appeal, the Kentucky Court of Appeals reversed this jury verdict and held that the clause in the insurance policy providing for exceptions to the automatic discontinuance of benefits due to a leave of absence or temporary layoff had not become operative.

The Kentucky Supreme Court held that the evidence supported the jury's finding that Davis was on a leave of absence within the meaning of the automatic termination exception in the insurance policy and was thus covered by the insurance policy at the time of his death.

The foregoing holding is based solely on the terms of the group life insurance policy issued by Manhattan Life Insurance Company; therefore, because this holding stems only from the narrowly defined provisions in this particular insurance policy, it can in no way be binding on either the Retirement Committee or this court.

At first blush, it may seem reasonable and rational that *Woodson v. Manhattan Life Insurance Co. of New York, supra,* should be dispositive of the issue of whether Davis was an employee of Kentucky Central at the time of his death. However, a determination that under one set of circumstances (i.e., the interpretation of the terms of a group life insurance policy issued by a private company) Davis was found to be an employee of Kentucky Central at the time of his death does not necessarily mean that he should be deemed to be an employee under *all* circumstances.

Upon closer inspection, the court concludes that *Woodson* is not binding on either the Retirement Committee or this court due to the inherent nature of the ERISA action itself and the well-settled law applicable to ERISA

actions. Attempting to juxtapose the rationale in *Woodson* to an ERISA action is like trying to mix apples and oranges. The standard of review the court is bound to follow in reviewing the actions of trustees in ERISA actions has absolutely no relationship to the applicable law the court is bound to follow in interpreting the terms of an insurance policy.

As pointed out in the court's Memorandum Opinion herein on June 21, 1988, in ERISA actions, a reviewing court has no authority to perform a *de novo* review of the decision of the Retirement Committee. *Cook v. Pension Plan For Salaried Employees,* 801 F.2d 865 (6th Cir. 1985). The review by this court is limited to a determination of whether the decision of the Retirement Committee was arbitrary and capricious.

In the Memorandum Opinion of June 21, 1988, the court set out the rationale of the Retirement Committee and the facts it considered in reaching its decision that Davis was not considered by the Retirement Committee to be employed by Kentucky Central at the time of his death. The information on which the Retirement Committee relied is contained in the affidavit of Edwin F. Schaeffer, Jr., a member of the Retirement Committee.

This court held that in light of the information presented to and considered by the Retirement Committee, its decision was reasonable, logical and supported by a rational basis. Therefore, as a matter of law, this court could not second-guess the Retirement Committee or substitute its interpretation of the underlying circumstances for that of the Retirement Committee.

Admittedly, the circumstances surrounding Davis' meeting with the Executive Committee on February 8, 1982, and his subsequent resignation are clouded and, due to Davis' death, are subject to more than one interpretation. This case was succinctly summarized by the *Woodson* court, as follows:

> This is a case where there is sharp disagreement as to the facts, and even more disagreement as to what inferences from the facts are appropriate in deciding Davis' status at the time he was killed. Manhattan Life insists that the evidence is conclusive that Davis was terminated on February 8, pointing to the trial testimony of various Kentucky Finance Company officials to prove this conclusion. But Davis points to the evidence that we have referred to earlier in this Opinion as sufficient to prove his status as an employee who had been placed in a terminal leave status for six months. On appeal from a verdict for the Estate, the only question is, was there substantial evidence to support the verdict?

Woodson, 743 S.W.2d at 837-838.

In summary, as previously pointed out, so long as the court is satisfied that the decision of the Retirement Committee was not arbitrary or capricious, this court has no authority to modify, reopen or reverse the Retirement Committee's decision. *Cook v. Pension Plan For Salaried Employees, supra*, and *Roberson v. General Motors Corp.*, 801 F.2d 176 (6th Cir. 1986).

Therefore, for the same reasons stated in the court's Memorandum Opinion of June 21, 1988, plaintiff's motions, collectively construed as a motion to alter or amend the Judgment under FRCP 59(e), must be denied.

The court being duly and sufficiently advised,

IT IS HEREBY ORDERED and ADJUDGED that plaintiff's three separately styled motions, collectively construed as a motion under FRCP 59(e) to alter or amend the Judgment of June 21, 1988, are DENIED.

This 18th day of August, 1988.

/s/ Scott Reed
SCOTT REED
SENIOR DISTRICT JUDGE

Copies as noted:
William R. Meredith
Henry E. Kinser
8/18/88 mst

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-6067

MISTY DAWN DAVIS, an infant under eighteen years of age, by and through her Guardian, Farmers Bank & Capital Trust Company of Frankfort, Kentucky Plaintiff-Appellant v. KENTUCKY FINANCE COMPANIES RETIREMENT PLAN; KENTUCKY FINANCE COMPANIES RETIREMENT PLAN RETIREMENT COMMITTEE; KENTUCKY FINANCE COMPANY, INC.; and CENTRAL BANK & TRUST COMPANY Defendants-Appellees ELLA MAE DAVIS Defendant	DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, Appellees make the following disclosure:

A. KENTUCKY FINANCE COMPANIES RETIREMENT PLAN

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

The Kentucky Finance Companies Retirement Plan was established by Kentucky Finance Company Inc. Kentucky Finance Company, Inc. is a wholly owned subsidiary of Mid-Central Investment Co., Inc., which is a wholly owned subsidiary of Kentucky Central Life Insurance Company, Inc., a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Kentucky Central Life Insurance Company, Inc., as the parent of Kentucky Finance Company, Inc., could have a financial interest in the outcome of this appeal.

B. KENTUCKY FINANCE COMPANIES RETIREMENT PLAN RETIREMENT COMMITTEE

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

See answer to A.1. above.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

See answer to A 2. above.

C. KENTUCKY FINANCE COMPANY, INC.

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

See answer to A.1. above

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

See answer to A.2. above.

D. CENTRAL BANK & TRUST COMPANY

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Central Bank is the trustee of a trust which owns approximately 83% of the voting stock of Kentucky Central Life Insurance Company, Inc., a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

See answer to A.2. above.

/s/ Henry E. Kinser
HENRY E. KINSER December 27, 1988
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